



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

April 13, 2005

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence H. Norton  
General Counsel

Rosemary C. Smith  
Associate General Counsel

Brad C. Deutsch  
Assistant General Counsel

Cheryl A.F. Hemsley  
Attorney

Subject: Draft AO 2005-03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 21, 2005.

Attachment

April 13, 2005

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-03 is available for public comments under this procedure. It was requested by counsel, Michael Kurman on behalf of American College of Obstetricians and Gynecologists.

Proposed Advisory Opinion 2005-03 is scheduled to be on the Commission's agenda for its public meeting of Thursday, April 21, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on April 20, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

### **CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2005-03, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

### **MAILING ADDRESSES**

Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

Rosemary C. Smith  
Associate General Counsel  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

1 ADVISORY OPINION 2005-03

2 Michael J. Kurman, Esq.

DRAFT

3 Arent Fox, PLLC

4 1050 Connecticut Avenue, N.W.

5 Washington, D.C. 20036-5339

6  
7 Dear Mr. Kurman:

8  
9 We are responding to your advisory opinion request on behalf of the American  
10 College of Obstetricians and Gynecologists (“ACOG”) regarding whether, under the  
11 Federal Election Campaign Act of 1971, as amended (the “Act”), ACOG and Ob-Gyns  
12 for Women’s Health (“OGWH”) are affiliated. If ACOG and OGWH are affiliated, you  
13 ask whether OGWH or its separate segregated fund (“SSF”), Ob-Gyn PAC, may solicit  
14 ACOG’s members for contributions to Ob-Gyn PAC; and if such solicitations are  
15 permissible, whether, specifically, ACOG’s Fellows and Junior Fellows qualify as  
16 solicitable members of ACOG.<sup>1</sup>

17 The Commission concludes that ACOG and OGWH are affiliated membership  
18 organizations. As such, OGWH or Ob-Gyn PAC may solicit ACOG’s members for  
19 contributions to Ob-Gyn PAC. The Commission also concludes that both Fellows and  
20 Junior Fellows qualify as solicitable ACOG members.

21 ***Background***

22 The facts of this request are presented in your letter of February 17, 2005, as  
23 supplemented by your letter of March 2, 2005.

---

<sup>1</sup> OGWH has represented to ACOG that it fully joins in ACOG’s request for an advisory opinion and has reaffirmed its stated intent to solicit ACOG members – via the potential sale by ACOG, and purchase by OGWH or Ob-Gyn PAC, of ACOG’s membership lists – if the Commission advises that such solicitation is legally permissible.

1 1. ACOG

2 ACOG is a private, voluntary membership group incorporated without capital  
3 stock. It operates as a nonprofit, tax-exempt educational and charitable organization  
4 under the Internal Revenue Code section 501(c)(3), and is dedicated to the advancement  
5 of women's health. You indicate that ACOG's membership consists of over 46,000  
6 individuals spread across several membership categories. Your request, however, is  
7 limited to two of ACOG's "membership categories" – Fellows and Junior Fellows.

8 2. OGWH

9 OGWH is a private, voluntary membership group, established in 2000 by a vote  
10 of ACOG's Executive Board and incorporated without capital stock. OGWH operates as  
11 a nonprofit, tax-exempt social welfare organization under the Internal Revenue Code  
12 section 501(c)(4), advocating laws and public policies that support the field of obstetrics  
13 and gynecology, and quality healthcare for women, generally. OGWH works to increase  
14 awareness among its members and the public of the changing public policies and  
15 legislation related to women's health care.

16 In January 2001, OGWH created an SSF called Ob-Gyn PAC. Ob-Gyn PAC  
17 currently only solicits contributions from OGWH members. ACOG intends to sell its  
18 member list to OGWH or Ob-GYN PAC for fair market value in order for OGWH or Ob-  
19 GYN PAC to solicit ACOG Fellows and Junior Fellows for contributions to Ob-Gyn  
20 PAC.

21 ***Questions Presented***

22 *Are ACOG and OGWH affiliated? If so, may OGWH or Ob-Gyn PAC solicit*  
23 *ACOG's members for contributions to Ob-Gyn PAC? If such solicitations are*

1 *permissible, do ACOG Fellows and Junior Fellows qualify as solicitable ACOG*  
2 *members?*

3 ***Legal Analysis and Conclusions***

4 *Question 1. Are ACOG and OGWH affiliated?*

5 The Commission concludes that both ACOG and OGWH are membership  
6 organizations under the Act and Commission regulations, and because ACOG established  
7 OGWH, they qualify as affiliated membership organizations under 11 CFR 100.5(g)(4).<sup>2</sup>  
8 *See also* 114.5(g)(1) and 11 CFR 114.7(g).

9 ACOG satisfies the Commission's requirements for membership organization  
10 status. ACOG Fellows have the right to select ACOG's governing Executive Board and  
11 to vote on other matters. ACOG Bylaws, Articles IV and XI; *see* 11 CFR 114.1(e)(1)(i).  
12 ACOG's Bylaws set forth specific professional requirements that applicants must meet to  
13 be accepted as members. ACOG Bylaws, Articles III-VIII; *see* 11 CFR 114.1(e)(1)(ii).  
14 ACOG's formal organizational documents are available to members upon request, and on  
15 ACOG's website.<sup>3</sup> *See* 11 CFR 114.1(e)(1)(iii). ACOG actively solicits members  
16 through its website and at ACOG-sponsored meetings, and acknowledges the applicants'  
17 acceptance of the invitation to membership with a Certificate for Fellows and a Letter of  
18 Election for Junior Fellows. *See* 11 CFR 114.1(e)(1)(iv)-(v). Finally, ACOG is  
19 dedicated to the advancement of women's health, and is not organized primarily for the  
20 purpose of influencing Federal elections. ACOG Bylaws, Article II; *see* 11 CFR  
21 114.1(e)(1)(vi).

---

<sup>2</sup> Commission regulations provide for a case-by-case examination of ten circumstantial factors found at 11 CFR 100.5(g)(4)(ii)(A) – (J) to determine whether two entities are affiliated.

<sup>3</sup> [www.acog.org](http://www.acog.org).

OGWH also satisfies the Commission's requirements for membership organization status. OGWH's Board of Directors, which is made up entirely of OGWH members in good standing, exercises exclusive policy-making and governance authority of OGWH. OGWH Bylaws, Articles II and III; *see* 11 CFR 114.1(e)(1)(i). OGWH's Bylaws state that membership in OGWH is open to anyone who pays the required dues. OGWH Bylaws, Article III; *see* 11 CFR 114.1(e)(1)(ii). OGWH's formal organizational documents are available to members upon request. *See* 11 CFR 114.1(e)(1)(iii). OGWH actively solicits members. OGWH Bylaws, Article III; *see* 11 CFR 114.1(e)(1)(iv). OGWH acknowledges acceptance of membership with a membership card or by adding the member's name to a newsletter list. OGWH Bylaws, Article III; *see* 11 CFR 114.1(e)(1)(iv). Finally, OGWH's purpose is advocating laws and public policies supporting quality healthcare for women, and the field of obstetrics and gynecology, and is not organized primarily for the purpose of influencing Federal elections. OGWH Bylaws, Articles I and V; *see* 11 CFR 114.1(e)(1)(vi).

The Act and Commission regulations provide that a membership organization may solicit contributions for a separate segregated fund from its members. 2 U.S.C. 441b(b)(4)(C); 11 CFR 114.7(a). The Commission's regulations at 11 CFR 114.7(g) further provide that an incorporated membership organization is subject to the rules at 11 CFR 114.5, which, in turn, provides that for purposes of determining affiliation, the rules at 11 CFR 100.5(g)(4) apply. 11 CFR 114.5(g)(1). Accordingly, in this instance, factors such as whether an organization had a significant role in the formation of another organization become determinative. *See* 11 CFR 100.5(g)(4)(ii)(I).

*Question 2. May OGWH or Ob-Gyn PAC solicit ACOG's members for contributions to Ob-Gyn PAC?*

Therefore, because ACOG and OGWH are affiliated membership organizations, OGWH or Ob-Gyn PAC may solicit ACOG's noncorporate members and executive and administrative personnel, and their families, for contributions to Ob-Gyn PAC.

*Question 3. Do ACOG Fellows and Junior Fellows qualify as solicitable ACOG members?*

Commission regulations define “members” of a membership organization as including all persons who are currently satisfying the requirements for membership, affirmatively accept the membership organization’s invitation to become a member and, either have a significant financial attachment to the organization, pay annual dues set by the organization, or have significant organizational ties to the membership organization. 11 CFR 114.1(e)(2). Both Fellows and Junior Fellows must satisfy the requirements for membership stated in ACOG’s Bylaws. ACOG Bylaws, Articles IV and V. Fellows and



1 Junior Fellows must accept the invitation to become members, and must pay annual dues.  
2 *Id.* Therefore, both Fellows and Junior Fellows are members of ACOG under the  
3 Commission's regulations and, as such, may be solicited by OGWH or Ob-Gyn PAC for  
4 contributions to Ob-Gyn PAC.

5 The Commission expresses no opinion regarding the applicability of the Internal  
6 Revenue Code, or of regulations promulgated by the Internal Revenue Service, to the  
7 status of ACOG or OGWH and the transactions contemplated in this request because  
8 those questions are outside the Commission's jurisdiction.

9 This response constitutes an advisory opinion concerning the application of the  
10 Act and Commission regulations to the specific transaction or activity set forth in your  
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any  
12 of the facts or assumptions presented, and such facts or assumptions are material to a  
13 conclusion presented in this advisory opinion, then the requestor may not rely on that  
14 conclusion as support for its proposed activity.

15  
16 Sincerely,

17  
18 Scott E. Thomas  
19 Chairman  
20  
21

22 Enclosure (AO 2003-29)  
23